

Internal Revenue Service
memorandum

CC:TL
Br4:JTChalhoub

date:

SEP 22 1987

to:

District Counsel, Seattle CC:W:SEA
Attn: H.T. Schafer

from:

Director, Tax Litigation Division CC:TL

subject:

██████████; Pre-90 Status

This is in reply to your memorandums, dated June 25 and July 10, 1987, requesting technical advice in the above case.

ISSUE

A Form 872-A consent contains a termination provision which states "[T]his agreement ends on the earlier of the above expiration date or the assessment date of an increase in the above tax that reflects the final determination of tax and the final administrative appeals consideration." The issue is whether such a Form 872-A was terminated by an erroneous assessment, where neither a valid I.R.C. § 6213(d) waiver was made of the amount assessed nor a valid I.R.C. § 6213(a) notice of deficiency was issued and defaulted. 6501.08-00.

CONCLUSION

"The assessment date of an increase in [income] tax that reflects the final determination of tax" is a termination provision, the language of which should be construed to consider the intention of the parties. Intent is an issue of fact, the proof of which should be elicited at an evidentiary hearing. Since the facts submitted indicate the taxpayer was neither misled nor notified the assessment was a final determination, we believe the period of limitations did not expire on the date of the erroneous assessment. Accordingly, the facts justify issuance of the notice of deficiency.

FACTS

The Service accepted from the taxpayers a valid Form 872-A for the tax year ████████ on ████████████████████. In relevant part, the agreement provides as follows:

• 08344

(1) The amount of any Federal income tax due on any return made by or for the above taxpayers for the period ended [REDACTED], may be assessed on or before the 90th (ninetieth) day after (A) the Internal Revenue Service office considering the case receives Form 872-T, Notice of Termination of Special Consent to Extend the Time to Assess Tax, from the taxpayers, or (B) the Internal Revenue Service mails Form 872-T to the taxpayers, or (C) the Internal Revenue Service mails a notice of deficiency for such period, except that if a notice of deficiency is sent to the taxpayers, the time for assessing the tax for the period stated in the notice of deficiency will end 60 days after the period during which the making of an assessment was prohibited.

* * *

(2) This agreement ends on the earlier of the above expiration date or the assessment date of an increase in the above tax that reflects the final determination of tax and the final administrative appeals consideration. *** Some assessments do not reflect a final determination and appeals consideration and therefore will not terminate the agreement before the expiration date. Examples are assessments of: (A) tax under a partial agreement, (B) tax in jeopardy, (C) tax to correct mathematical or clerical errors, (D) tax reported on amended returns, and (E) advance payments.

* * *

(3) This agreement will not reduce the period of time otherwise provided by law for making such assessment. *** [Emphasis supplied.]

Revenue Agent, C.L. Neeley, examined the tax years [REDACTED] through [REDACTED]. As a result of his audit, he prepared three Forms 4549 and one Form 4549-A. On [REDACTED], he prepared a Form 4549(#1), relating to the tax year [REDACTED] that showed no deficiency and no overassessment. The taxpayers indicated agreement with that form by signing it on [REDACTED]. Another Form 4549(#2) reflects adjustments to the tax years [REDACTED],

██████ and ██████. This form shows, respectively, overpayments for ██████ and ██████ of \$██████ and \$██████ and a deficiency due of \$██████ for ██████. The taxpayers signed an agreement to those adjustments on ██████. A third Form 4549(#3) was prepared ██████, after receipt of a copy of the taxpayers' ██████ return. That Form 4549 shows an overpayment from an investment credit carryback, from ██████ to ██████, in the amount of \$██████. The taxpayers signed an agreement to that overpayment on ██████.

The taxpayers had earlier engaged counsel to advise and represent them. ██████, taxpayers' attorney under power, wrote a letter to Revenue Agent Neeley, dated ██████. The letter refers to an unagreed adjustment for ██████ and requests that he prepare revised computations. This he did. In addition to Forms 4549(#1) and (#2), Neeley prepared Form 4549-A for ██████ showing an unagreed deficiency of \$██████ and a negligence penalty of \$██████. Form 4549-A shows a net tax deficiency after an agreed adjustment that creates a "fictitious" overpayment of \$██████ for ██████, as shown on Form 4549(#2). ██████'s ██████, letter transmitted the signed agreements on Forms 4549 and, acknowledged therein that the examiner would prepare an unagreed report for ██████.

Revenue Agent Neeley's R.A.R., dated ██████, was forwarded to the San Francisco Quality Review Staff for processing and issuance of a 30-day letter. The R.A.R. included a Form 3198 instructing reviewers not to make any refunds "pending disposition of unagreed deficiency in ██████." Neeley informed us that whenever an examination is completed and the file is closed out to the review staff with an unagreed deficiency his instructions are to prepare a Form 3198 Special Handling Notice. This internal use form is yellow and is designed to be placed atop the administrative file to alert reviewers that the case requires special handling. Such a Form 3198 was prepared with special instructions in the instant case, but was not found by District Counsel in its, allegedly, conspicuous position atop the administrative file.

The facts do not indicate why, but a 30-day letter was not issued for ██████ until ██████, some 19 months after the examiner's report. That 30-day letter was protested by ██████ in a letter to the San Francisco Quality Review Staff, dated ██████, requesting a conference with Appeals. For some unknown reason, this protest letter was not associated with the file in review until a much later date.

On December 30, 1985, while the case was assigned to the Quality Review Staff in San Francisco, an employee of the Examination Support Program Section (ESP), had a telephonic

assessment made for [REDACTED] at the Service Center in the amount of the net deficiency. The Reviewer's file did not include a protest to the 30-day letter at that time. Following such assessment, the taxpayers received a bill, dated [REDACTED], the assessment date. On January 22, 1986, the taxpayers' counsel contacted the "Notices" section in Seattle to question how the Service could bill his clients without issuing a notice of deficiency. Roger Fritz, from Seattle Quality Review, who had looked into the matter, called [REDACTED] on March 28, 1986, and advised him that an erroneous assessment appeared to have been made. Fritz suggested that any collection contacts be referred to him. During that conversation, according to Fritz' notes, [REDACTED] was told that a transcript of account did not reveal any [REDACTED] partial assessment, the specific agreement to which [REDACTED] recalled making. Fritz advised him the unagreed amount must have been assessed in error as if it were an agreed amount. Later, after confirming the facts and after informing [REDACTED], Fritz referred the matter to Tom Schafer of District Counsel, Seattle. District Counsel recommended abatement of the assessment and continuation of appeal rights for the taxpayers. After several contacts by Roger Fritz, and after abatement of the deficiency assessment, on [REDACTED], [REDACTED] suggested the case be referred to Appeals with the understanding the taxpayers would contend the period of limitations had expired on [REDACTED]. Appeals has asked District Counsel, Seattle, whether a notice of deficiency should be issued.

DISCUSSION

Form 872-A is a unilateral waiver of the taxpayers' defense of expiration of the period of limitations. It is not a contract. Stange v. United States, 282 U.S. 270 (1931). Contract principles are significant, however, because I.R.C. § 6501(c)(4) refers to "agreement" of the parties. See Piarulle v. Commissioner, 80 T.C. 1035, 1042 (1983). There is no dispute concerning the validity of the consent. However, there is a dispute concerning application of its terms and conditions, specifically, the termination provisions.

The term "agreement" means a manifestation of mutual assent. S. Williston, Contracts 6 (3d ed. 1957). Thus, in determining the meaning of an agreement, it is important to ascertain the intent of the parties. Did the Commissioner in making an erroneous assessment, pursuant to an agreement showing overassessments on Form 4549, intend such assessment to terminate Form 872-A? Stated another way, did the parties, in executing Form 872-A, contemplate a termination based on an erroneous assessment. Stated a third way, is an executed Form 4549 a closing agreement, permitting assessment of a final tax liability

for the year, within the meaning of I.R.C. § 7121, so as to indicate the Commissioner's "final" administrative determination. */ Our answer to all three questions is we think not.

Form 4549, generally, indicates agreement to a proposed deficiency, when executed by the taxpayer. However, the computation may also show agreement to an overassessment due the taxpayer. A taxpayer, who files a Form 4549 showing his agreement to a deficiency, is not precluded from suing for a refund; nor is the Service precluded from determining an additional deficiency for the tax year (or years) covered by the Form 4549. See Wasserstrom v. Commissioner, T.C.M. 1986-417 with respect to the finality of a Form 1902-E (similar to Form 4549) and Person v. Commissioner, T.C.M. 1985-211 with respect to the finality of a Form 433-D installment payment agreement. Therefore, a Form 4549 does not, of itself, represent a binding contractual agreement as to tax liability between the taxpayer and the Service. A waiver of restrictions on a deficiency, filed on Form 4549, is neither a closing agreement nor a binding contractual agreement. Hudock v. Commissioner, 65 T.C. 351, 354-355 and 362-364 (1975); Holland v. Commissioner, 70 T.C. 1046 (1978) aff'd., 622 F.2d 95 (4th Cir. 1980).

The consent on Form 872-A must be construed under contract principles, even though the agreement is not a contract. The leading case regarding interpretation of consents to extend the period for assessment is Constitution Publishing Co. v. Commissioner, 22 B.T.A. 426 (1931). In that case, the Board of Tax Appeals stated:

It is a primary rule of construction of documents that the Court must if possible ascertain and give effect to the mutual intention of the parties and in doing this greater regard is to be had to the clear intent of the parties than to any words which they may have used in the expression of their intent. [citations omitted.] The intention

*/ For reasons set forth more fully below, we believe the opinion in Roszkos v. Commissioner, 87 T.C. 1255 (1986), appeal to Ninth circuit filed July 14, 1987, is distinguishable both legally and factually, because the taxpayers claim the erroneous assessment is a "final determination of tax" based on Forms 4549 and/or 4549-A rather than on a defaulted notice of deficiency.

of the parties is to be collected and determined from the entire instrument and not merely from detached portions.

22 B.T.A. at 428-429

Form 872-A includes several termination provisions. Generally, paragraph (1) is the operative provision that results in termination, i.e., Form 872-T sent by a taxpayer or a notice of deficiency sent by the Service. Paragraph (2), on the other hand, applies when a case is completely settled. Partial settlement agreements are expressly excluded. The taxpayers, their duly authorized representative and the examining agent were all aware the examination had resulted in only a partial agreement. All correspondence from [REDACTED], and reported contacts by Roger Fritz with [REDACTED], indicate and acknowledge a partial agreement.

We are informed that [REDACTED]'s 30-day protest letter was not associated with the administrative file. Arguably, this would explain why the case was treated as a "no response" case and referred to the ESP unit. This would further explain why Hermo Madrid, an ESP clerk, received the administrative file for closing. Moreover, the absence of Form 3198 from its usual conspicuous place atop the administrative file, instructing the reviewer to freeze refunds (and to follow notice of deficiency procedures in an unagreed case), would further explain why Hermo Madrid mistakenly read the Form 4549 agreement for [REDACTED], [REDACTED] and [REDACTED] to mean an agreement to the proposed deficiency on Form 4549-A for [REDACTED].

Does Madrid's erroneous assessment prove an intention by the Commissioner to terminate the Form 872-A agreement? A "final determination of tax" cannot legally occur in the absence of an agreement that qualifies as a closing agreement. No court would hold that Form 872-A was a closing agreement. The Service (and many courts) treat informal closing agreements on Form 870-AD as the "final administrative appeals consideration." In any event, to cover the possibility of the Service having missed a large adjustment, a taxpayer is not officially notified except by formal (I.R.C. § 7121) or informal (Form 870-AD) agreement that a tax has been finally determined for the taxable year. Even if the "unagreed" deficiency had been "agreed" on Form 4549, the waiver and subsequent assessment would not satisfy the legal definition of a "final determination of tax." If the executed document is not a valid compromise of a tax deficiency, within the meaning of I.R.C. § 7121, it may not necessarily estop the executing taxpayer from seeking a refund. Botany Worsted Mills v. United States, 278 U.S. 282, 288 (1929); Whitney v. United States, _____ F.2d _____ (9th Cir. Filed September 1, 1987).

That is not to say a taxpayer who signed agreement to a deficiency was not misled into signing, on the representation that this would be a "final determination of tax." Under those circumstances a taxpayer could argue equitable estoppel if the Service later sent him a deficiency notice. Here, however, the facts reveal no false representation, no reliance upon any misleading representation and no detriment or change of position resulting from such reliance. See Piarulle v. Commissioner, supra.

Finally, we find it incredible to believe that at the time of executing a valid Form 872-A, the parties contemplated that termination could occur, and a "final determination of tax" result, from an erroneous assessment. Not only is such a construction of the agreement incredible, but it would lead to an absurd result. Constitution Publishing Co. v. Commissioner, supra. The Form 872-A agreement does not refer to erroneous assessments. Arguably, any "assessment" could be a final determination of tax, except for the qualifying language expressly excluding by example, (A) tax under a partial agreement, (B) tax in jeopardy, (C) tax to correct mathematical or clerical errors, (D) tax reported on amended returns, and (E) advance payments. If all of these specific assessments are excluded, it borders on the frivolous to assume that erroneous assessments would not be another example of an assessment that is not a "final determination of tax."

Under the circumstances, we conclude the Form 872-A consent was not terminated by the erroneous assessment on [REDACTED] (which has since been abated) and we recommend a notice of deficiency be sent to the taxpayer for [REDACTED].

ROBERT P. RUWE
Director

By:



HENRY G. SALAMY
Chief, Branch No. 4
Tax Litigation Division